UNIFORMITY OF LAW IN THE SEVERAL STATES AS AN AMERICAN IDEAL.[1]

IV. — STATE COURTS VERSUS FEDERAL COURTS.

1. CASES based upon rights conferred by federal law, or presenting federal questions, are usually brought in the federal courts, and in many instances must be brought in those courts. There are many questions of federal law which may be litigated in state courts, subject to a right of removal to the federal courts, or to review by the Supreme Court of the United States by writ of error to the highest court of the state in which a decision of the federal question can be had. The federal law is the supreme law of the land, but that quality of the federal law is the same whether it is construed and declared in a state court or in a federal court. It by no means follows as a corollary from the supremacy of the federal law that the federal courts are also supreme over the state courts. The rule as between the courts is, that when a court of either sovereignty has acquired jurisdiction of a cause, the courts of the other sovereignty will not interfere to prevent the exercise of jurisdiction by injunction or other writ against the court.[2] It is usually possible for counsel to get all cases involving federal questions before the federal courts for decision, whenever for any reason it is deemed desirable to avoid a decision of the question in a state court. This was illustrated with great clearness in the recent case of *Ex parte* Young,[3] — a case which also illustrates with great vividness the paramount quality of the federal law. The Attorney-General of Minnesota was forbidden by injunction issued by a judge of a circuit court of the United States from taking any steps against certain railroads to enforce the remedies or penalties specified in rate laws of the State of Minnesota,

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[1] Continued from 21 HARV. L. REV. 526.

[2] See U. S. Rev. Stat. § 720. Peckham, J., says, in *Ex parte* Young, decided March 23, 1908, "an injunction against a state court would be a violation of the whole scheme of our government. If an injunction against an individual is disobeyed, and he commences proceedings before a grand jury or in a court, such disobedience is personal only, and the court or jury can proceed without incurring any penalty on that account."

[3] 209 U. S. 123.

passed in April, 1907. In the performance of his duty, as he believed, as chief law officer of the state, the Attorney-General violated the injunction by applying in a state court for a writ of *mandamus* against the Northern Pacific Railway Company, and was fined for contempt by the federal court and committed to jail for non-payment of the fine. On a petition for *habeas corpus* under the original jurisdiction of the Supreme Court of the United States, the action of the circuit court was sustained. The state statute in question was one of a numerous class of statutes enacted by various states for the purpose of exercising public control over railroad corporations. The material point to notice here, in connection with uniformity of law, is the manner in which such statutes are likely to be construed and dealt with in state and in federal courts. The duty of construction is the same in each court, and the principles of construction applicable are precisely the same, but the opponents of the act were plainly desirous of bringing the question before the federal court, in preference to the state court. The statute was declared unconstitutional by the Supreme Court. The supposed law was a nullity, opposed to the national Constitution, and afforded no protection and conferred no rights. The case also brings into clear light a quality of the Constitution which has been perceived and noted by lawyers and publicists,[1] but probably has not been clearly perceived by the public. The national Constitution was framed in 1787 by men who learned their law from Blackstone. It is the strongest bulwark of individualism to be found in any constitutional government in the world. Socialism or collectivism probably can go farther and faster in England, where the dominant opinion of the electorate can control Parliament, than in the United States, where the clause in the Constitution prohibiting the enactment by a state of any law impairing the obligation of contracts, and the provisions of the Fourteenth Amendment, securing certain fundamental rights against state action, stand in its way.

Whenever the validity of any state statute is drawn in question on the ground that it violates the provisions of the national constitution, that question can be determined finally only by one tribunal, the Supreme Court of the United States. This tends to secure uniformity in a large class of state legislation by subjecting it to

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[1] Dicey, Law and Opinion, 308; 21 L. Quar. Rev. 230; Federalist, No. 44, by Madison.

the provisions of one constitution and the construction of one supreme court.

2. When a question arising under the Constitution or laws or treaties of the United States has been decided by the Supreme Court, that decision is binding throughout the United States in both state and federal courts. The law upon that subject is uniform throughout the country. Under the clause in the Constitution conferring jurisdiction on the federal courts in cases arising between citizens of different states, cases are frequently brought in the federal courts which do not depend upon federal law. For example, in Swift *v.* Tyson,[1] decided by the federal Supreme Court in 1842, in an action by the indorsee against the acceptor of a bill of exchange, the question was whether a pre-existing debt was a valuable consideration for an indorsement and transfer of the bill. The acceptance was in New York, and upon ordinary principles subject to the law of New York. Judge Story, in delivering the opinion of the Supreme Court, announced the rule that in questions of commercial law not depending upon any local statute or positive, fixed, or ancient, local usage, the federal courts were not bound by decisions of state courts, but were bound to decide in accordance with their own views of commercial law. This doctrine has since been applied to other questions of general law not depending upon local usage or statute.

When once announced by the Supreme Court, this doctrine became the rule of action for all inferior federal courts. The effect was two-fold. In the first place, it created a new source of diversity in all parts of private law not depending upon statute or local usage by making it possible for the state courts in a given state, and the federal courts sitting within the same state, to adopt different rules upon the same question of law. This has happened in a number of instances. On the other hand, a second and more important effect of the decision in Swift *v.* Tyson was to give to the Supreme Court of the United States a great opportunity to aid in securing uniformity of private law throughout the country. In any state court where a question of private law not depending upon statute or local usage arose for the first time the opinion of the Supreme Court of the United States upon that question would naturally have great weight. As the court authorized to construe the Constitution of the United States, it held a position of para-

[1] 16 Pet. (U. S.) 1.

mount authority in relation to federal questions, and that circumstance lent weight to its decisions upon all other questions, especially as those decisions were binding in all inferior federal courts. Judge Story doubtless saw that situation in delivering the opinion in Swift *v.* Tyson. He was at all times a vigorous asserter of federal authority.[1] Once only, in The Thomas Jefferson,[2] where he followed the English rule then prevailing, and limited the admiralty jurisdiction to the ebb and flow of the tide, did he miss an opportunity to extend the judicial power of the United States. In Martin *v.* Hunter,[3] in 1816, he declared that "the whole judicial power of the United States should be, at all times, vested either in an original or appellate form, in some courts created under its authority." In De Lovio *v.* Boit,[4] while sitting in the circuit court, he vindicated the jurisdiction of the admiralty over contracts of marine insurance wherever made, a jurisdiction which was afterwards sustained by the Supreme Court.[5] So in Swift *v.* Tyson, whether consciously animated by a purpose to extend the federal judicial power or not, he adopted a construction of the 34th section of the Judiciary Act of 1789 which gave to the federal courts independent coördinate authority with the state courts upon all questions of general law, and to the Supreme Court of the United States an opportunity to establish and maintain leadership of the state courts in the wide domain of private law. It is probable that all the judges of the Supreme Court at that time fully realized the importance and influence of the court. Thus Judge Catron, while dissenting in Swift *v.* Tyson upon the ground that one point decided by the court was not involved in the case, said: "whereas, if the question was permitted to rest until it fairly arose, the decision of it either way by this court probably would, and I think ought to, settle it."[6] The rule in Swift *v.* Tyson is so important that a few illustrations will be submitted to show the manner in which the federal influence has worked.

In 1873 in New York Central R. R. *v.* Lockwood,[7] the question was presented to the Supreme Court whether a common carrier could lawfully stipulate for exemption from liability for negligence of himself or his servants. The question arose in the case of a drover who shipped cattle at Buffalo to be transported to West

[1] 1 Story, Life and Letters, 254.
[2] 10 Wheat. (U. S.) 428 (1825).
[3] 1 Wheat. (U S.) 304.
[4] 2 Gall. (U. S.) 398.
[5] New England Marine Ins. Co. *v.* Dunham, 11 Wall. (U. S.) 1 (1871).
[6] 16 Pet. (U. S.) 1, 23.
[7] 17 Wall. (U. S.) 357.

Albany under a contract by which he was to accompany the cattle and take the risk of personal injuries from whatever cause. It was a question of importance to the whole country. A number of state courts had previously passed upon it, and the Court of Appeals of New York, the state in which the Lockwood case arose, had upheld the stipulation in favor of the exemption of the common carrier. The Supreme Court of the United States reached the opposite conclusion, in a unanimous decision, the opinion being written by Mr. Justice Bradley. Professor Gray has called attention to the influence exerted by the opinion of Judge Miller in Nichols *v.* Eaton[1] in spreading the doctrine of spendthrift trusts.[2] Similar observations will apply to the opinion of Judge Bradley in the Lockwood case. At the bar of New Jersey he seems to have been able to convince the Supreme Court of that state that the grantee in a deed purporting to be an indenture *inter partes* was liable in covenant, although the indenture was executed by the grantor alone.[3] The reader may form some idea of the range of his learning and grasp of his mind as a judge by reading his opinions in Norwich & N. Y. Transportation Co. *v.* Wright,[4] in The Lottawanna,[5] and in the Civil Rights Cases.[6] The Lockwood opinion is written in his best style. It combines a full presentation of the existing state of the law upon the question in the state courts and in England with original reasoning upon the principles of law and considerations of policy applicable to the case, and sums up the result in four conclusions, denying the right of a common carrier of goods or passengers to stipulate for exemption from responsibility for negligence of himself or his servants. A leading text-book says: "These conclusions, after so thorough an examination of the subject, may be said to have most decidedly turned the scale in favor of the exclusion of all contracts between carriers and their employers, exempting the former from the negligence, of every grade, of themselves or their employees or servants."[7]

It was fortunate also for the case of Swift *v.* Tyson that the

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[1] 91 U. S. 716.

[2] Gray, Restraints on Alien., 2 ed., Preface, v.

[3] Finley *v.* Simpson, 2 Zab. (N. J.) 311. See Rawle, Covenants for Title, 5 ed., § 272, n. 5.

[4] 13 Wall. (U. S.) 104.

[5] 21 *ibid.* 558.

[6] 109 U. S. 3.

[7] 1 Hutchinson, Carriers, 3 ed., § 453. See also § 450, n. 24, and §§ 451 and 452.

opinion was written by an eminent judge. In 1842 Judge Story was at the height of his fame. His authority was especially strong in commercial law, but the opinion has the weakness which usually results from deciding more than the facts of the case require. The question presented was whether the taking of a bill in payment of a pre-existing debt was a valuable consideration sufficient to exclude equities of the acceptor against prior holders. The court went beyond this question and decided not only that a taking in payment, but a taking as collateral security for a pre-existing debt, was a valuable consideration sufficient to exclude all equities. The case seems to have been quite generally followed in the state courts upon the first point, but less widely where the transfer was as collateral security.[1] It was contrary to the law of New York upon both points, and created a diversity between the law administered in the state courts and the federal courts within that state which continued — notwithstanding the hope expressed by Mr. Justice Clifford in Brooklyn City Bank *v.* Nat'l Bank of the Republic,[2] that the courts of New York would concur at no distant day[3] — until the passage of the Negotiable Instruments Act in 1897. It was supposed by some authorities that this statute in section fifty-one settled the law in accordance with Swift *v.* Tyson.[4] Other authorities have suggested that section fifty-one presents a question of construction.[5] The Supreme Court of New York in the Appellate Division has held in two cases that taking negotiable paper merely as security does not constitute a holder for value within the meaning of the statute.[5] The persistence of this question illustrates one of the dangers lying in wait for every statute which aims to codify the whole or any portion of our private law. It was well put by Lord Macnaghten on the Rule in Shelley's Case: "That was putting the case in a nutshell. But it is one thing to put a case like Shelley's in a nutshell, and another thing to keep it there."[6] It is comparatively easy to put the law of negotiable paper into a uniform statute and to procure the enactment of that statute in many states. To keep it uniform will require the best efforts of an able bar and of many wise and learned courts.

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[1] 1 Ames, Cas. on Bills and Notes, 650, n. 1, and 667, n. 1. See also 4 Am. & Eng. Encyc., 2 ed., 290 and n. 4; 291 and n. 2.

[2] 102 U. S. 14, 58 (1880).

[3] See Dill., Laws & Jurisp., 245.

[4] Crawford, Ann. Neg. Inst. Law, 2 ed., 32, § 51; Brewster *v.* Shrader, 26 N. Y. Misc. 480.

[5] Huffcut, Neg. Inst., 333, n. 1. [6] Van Grutten *v.* Foxwell, [1897] A. C. 658, 671.

In 1872, in Mutual Life Insurance Co. *v.* Terry,[1] the Supreme Court of the United States passed upon the question of the meaning of a clause in a policy of life insurance providing that the policy shall be void if the person insured shall die by his own hand. At that time, as was said by Mr. Justice Gray in Manhattan Insurance Co. *v.* Broughton,[2] "there was a remarkable conflict of opinion in the courts of England, in the courts of the several states, and in the circuit courts of the United States, as to the true interpretation of such a condition." The Supreme Court decided that if the assured committed the act of self-destruction when his reasoning faculties were so far impaired that he was not able to understand the moral character of his act, it was not within the condition of the policy, and the insurer was liable. There is now strong authority in the state courts in favor of that view.[3]

In 1851, in Little Miami Railroad Co. *v.* Stevens,[4] the Supreme Court of Ohio introduced into the law of master and servant a new rule known as the superior-servant rule, which was a great departure from the common law as laid down in Farwell *v.* Boston & Worcester Railroad.[5] The action was by an engineer for personal injuries caused by the negligence of the conductor in charge of the train. The court held that "where an employer placed one person in his employ under the direction of another, also in his employ, such employer is liable for injury to the person of him placed in the subordinate situation, by the negligence of his superior."

This rule has produced diversity and confusion in the law of master and servant similar to that which Lawrence *v.* Fox produced in the law of contract. It spread from Ohio to other states, and there are now "no less than five distinct interpretations of the superior-servant limitation."[6] The weight of the Supreme Court of the United States, after a period of uncertainty, was at last thrown decisively into the scale against the limitation, in Baltimore & Ohio R. R. *v.* Baugh[7] and New England Railroad *v.* Conroy.[8]

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[1] 15 Wall. (U. S.) 580.

[2] 109 U. S. 121, 127.

[3] Wambaugh, Cas. on Ins., 769 and n. 1; 19 Am. & Eng. Encyc., 2 ed., 77. See, however, Daniels *v.* N. Y., N. H. & H. R. R., 183 Mass. 393, 399.

[4] 20 Oh. St. 416.

[5] 4 Met. (Mass.) 49.

[6] 12 Am. & Eng. Encyc., 2 ed., 922.

[7] 149 U. S. 368 (1892).

[8] 175 U. S. 322 (1899).

There are signs that those decisions have had an influence upon the decisions of state courts.[1]

Without a full and thorough examination of all the decisions in the state courts bearing upon the question it is impossible to measure accurately the effect of the rule in Swift *v.* Tyson in securing uniformity of law. That it has affected the course of decision favorably to uniformity in states where the law had not previously been settled seems reasonably clear. The state courts on their part, while freely acknowledging the duty of obedience to the Supreme Court upon all questions depending upon the Constitution, treaties, or laws of the United States, have firmly asserted their independent authority upon all questions of general law. No case has ever fallen under my notice where either a state or a federal court has yielded its own previously declared opinion to the other on a question of commercial or other general law. In 1848 the points decided in Swift *v.* Tyson were presented again in the highest court of New York, in Stalker *v.* McDonald,[2] where Chancellor Walworth re-examined the decisions in an elaborate opinion and concluded thus: "Nor do I think that the settled law of this state is so manifestly wrong as to authorize this court to overturn its former decision, for the purpose of conforming it to that of any other tribunal whose decisions are not of paramount authority." So in 1877, in Mynard *v.* Syracuse, Buffalo & New York R. R., involving the question in the Lockwood case, the Court of Appeals by Church, Ch. J., said: "If we felt at liberty to review the question, the reasoning of Justice Bradley in that case would be entitled to serious consideration, but the right thus to stipulate has been so repeatedly affirmed by this court that the question cannot with propriety be regarded as an open one in this state."[3] One incidental benefit resulting from the rule in Swift *v.* Tyson has been to stimulate elaborate discussions of opposing doctrines in several cases in the state and federal courts. The great case of Hill *v.* Boston,[4] in Massachusetts, involving a fundamental doctrine in the law of municipal liability for negligence, is devoted largely to an examination of the grounds and authorities relied upon in Barnes *v.* District of Columbia,[5] to which it is opposed. On the other hand, the point in the Barnes case was

[1] Rose, Notes on U. S. Reports, 3 Supp. 373, 376, 1062–1064; 75 Am. St. Rep. 580, and notes at 609, 625–626.

[2] 6 Hill (N. Y.) 93.

[3] 71 N. Y. 180, 185.

[4] 122 Mass. 344.

[5] 91 U. S. 540 (1876).

before the federal Supreme Court again in 1889 and was affirmed.[1]

In leaving this subject two considerations are submitted. (*a*) The uniformity of decision on questions of general law throughout the United States in the federal courts[2] is an impressive fact, in comparison with the numerous diversities, at times almost frivolous, in the rules of commercial law and general common law and equity which have grown up in the various states, and which stop at state lines. This spectacle is one fact which gives momentum to the federalizing tendency of the time, by causing men to long for the convenience and certainty which come from a uniform body of private law. (*b*) This spectacle of uniformity throughout the federal domain brings home impressively the good sense, one might say the vast wisdom, of the English judges in establishing and upholding the doctrine of the binding quality of precedents, both at common law and in equity.[3] This rule came to the colonies with the English law. By means of it the entire judiciary of the nation is, as it were, consolidated into one body. The law as declared by the highest federal court is the law for all inferior courts within the jurisdiction. If this were not so, each court would stand by itself. Its decision would have no force except upon the parties to the cause. Such is the effect of the decision of a court, even of the highest court, on the continent of Europe. That, no doubt, is one reason why the courts of Europe do not hold the position of dignity and power which they enjoy in common law countries like England, or in the United States, where, by the written constitutions, they are erected into a coördinate branch of the government.

3. The federal courts, under the Constitution and laws of Congress, administer law and equity as separate systems, and have a uniform system of equity law and of equity procedure throughout the United States. There is no separate court of equity. In the states, on the other hand, there is no uniformity of method in dealing with equity. Four states have separate courts of chancery.[4]

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[1] District of Columbia *v.* Woodbury, 136 U. S. 450.

[2] Of course there may be, and frequently has been, conflict of decision among different circuits until the question is passed upon by the Supreme Court.

[3] See Gee *v.* Pritchard, 2 Swanst. 402, 414, per Eldon, L. C. (1818); Osborne *v.* Rowlett, 13 Ch. D. 774, 784, per Jessel, M. R. (1880).

[4] New Jersey, Delaware, Tennessee, and Mississippi. Hartshorne, Courts and Procedure, 28–32 (1905), gives a list of six states besides New Jersey as having courts of chancery. He includes Vermont, Alabama, and Michigan, states where it seems that the chancellors or equity judges have also a common law jurisdiction.

In some states, as in Massachusetts, law and equity are administered in the same courts, but as separate systems under an equity procedure modified more or less by statute. In the code states law and equity are administered as one system in the same action. A cardinal principle of the code procedure is, "a single form of action for the protection of all primary rights, whether legal or equitable."[1] This is the so-called fusion of law and equity. It may be confidently affirmed, however, that no legislator has ever yet succeeded in fusing law and equity. No legislator ever will succeed who is not a master of both law and equity, and such a legislator probably will not attempt it. All that can be done is to confer upon the same court or magistrate what may be called the *in rem* jurisdiction of the common law, by virtue of which a right sued upon is extinguished by the judgment, and changed into an obligation of a different nature, and the *in personam* jurisdiction of the chancellor.[2] Practically the best results seem to be attainable by administering both systems through one court, but with separate divisions adjusted to meet the demands of public business. This is in substance the plan of the English Judicature Act.

4. In common law cases the federal courts have preserved the system of trial by jury substantially as it is used and practiced in England. In Capital Traction Co. *v.* Hof the Supreme Court decided, speaking by Mr. Justice Gray, that trial by jury under the Constitution "is a trial by a jury of twelve men, in the presence and under the superintendence of a judge empowered to instruct them on the facts, and (except on acquittal of a criminal charge) to set aside their verdict if in his opinion it is against the law or the evidence."[3] This rule secures the dignity of the court and gives to the community the benefit of the experience and wisdom of the judge in guiding the jury to just results and tends to provide and maintain a firm and steady administration of public justice. In some of the states the presiding judge in a jury trial is stripped of his common law power, required to instruct the jury in writing, and only upon subjects on which instructions are requested.[4] Under this system, the speech of *Horne Tooke* to the jury,[5]

[1] Hepburn, Hist. Development of Code Pleading, 12.

[2] See Langdell, Equity Pleading, 2 ed., § 43, and n. 4.

[3] 174 U. S. 1, 14 (1898).

[4] See 11 Am. & Eng. Encyc., 1 ed., 261–264; Thompson, Charging the Jury, Introduction and cc. V., VI.

[5] Lord Kenyon inquired at the close of the plaintiff's evidence, Is there any defense? "*Horne Tooke* (taking a pinch of snuff, and looking round the court for a

intended no doubt as a studied insult to Lord Kenyon, comes too near the truth.

These four points of difference between the state and federal courts — to which may be added the further point that under the Constitution all federal judges "shall hold their office during good behavior" — are of such capital importance that differences in results in the work of the two systems in administering justice are likely to appear in time. The increase of business in the federal courts in recent years is a fact worthy of careful study. In 1872 Judge Curtis said to the students at the Harvard Law School: "When I came to the bar forty years ago, there were comparatively few cases tried in the courts of the United States. They were generally important cases, but they were few, and the number of practitioners engaged in those courts was small."[1] At the present time some knowledge of federal law and practice is practically a necessity for every member of a state bar. In the competition, so to speak, between the state courts and the federal courts, it is of the utmost importance that the efficiency of the judiciary of the states should be maintained. If diversities in the laws of the states continue to increase, increasing dissatisfaction of the community may cause all persons who are interested in uniformity of law to unite in a general movement to extend the federal jurisdiction in the sphere of private law. If Congress should make the jurisdiction of the federal courts exclusive in every case to which the judicial power of the United States extends, the volume of business in the state courts would be diminished.

There is a strong tendency at the present time to extend the legislative power of the national legislature, especially in the regulation of interstate commerce. It is quite probable that in the future Congress will exercise control under the Constitution over subjects which have hitherto been left to the legislative action of the states. That tendency is increased by the unfortunate belief which is wide-spread among the people that state legislatures have not legislated with wisdom and fidelity to the public

minute or two): 'There are three efficient parties engaged in this trial, — you, gentlemen of the jury, Mr. Fox, and myself, and I make no doubt that we shall bring it to a satisfactory conclusion. As for the judge and the crier, they are here to preserve order; we pay them handsomely for their attendance, and in their proper sphere they are of some use; but they are hired as assistants only; they are not, and never were intended to be, the controllers of our conduct." 3 Campbell, Lives of the Chief Justices, 2 ed. (1858), 70.

[1] Curtis, Jurisdiction U. S. Courts, 1.

interests. The existence of this belief is proved convincingly by the many provisions[1] of modern state constitutions manifestly aimed at the restriction of legislative power. If, unhappily, the judiciary department of the states, or of a number of the states, should also fail in public esteem or confidence, what would become of the governments of the states? Without an upright and efficient judiciary the states cannot endure. Without the states the union of states cannot endure.

Uniformity of law in the several states gains new importance when viewed as a means of upholding the state courts as against the federal courts, and of preserving the just balance between the federal government and the governments of the states. Such uniformity cannot be attained or preserved merely by reducing the law or a portion of the law to a statute or code. It can be attained and preserved only by the united efforts of all who are engaged in the study or administration of the law, in a spirit of loyal devotion to the inherited systems of common law and equity which have descended to us from the past. The most effective organization of courts in the several states, with a view to secure to the public the best administration of justice, and to maintain the science of jurisprudence in spite of the mass of precedents and statutes and the bewildering diversity of rules, will come only through labors informed and inspired from the same great sources. Upon the quality of the work done by the judges, lawyers, and teachers of law in the United States, in their respective spheres, depends the future of uniformity of law in the several states, and, it may almost be said, the existence of state law, and of the states themselves as political sovereignties.

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[1] 1 Bryce, Am. Comm., 3 ed., 444 and 468; Dicey, Law and Opinion, 9; 1 Am. Pol. Sci. Rev. 210; Reinsch, c. VIII., The Perversion of Legislative Action.